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No. 79-678

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

SAN DIEGO GAS & ELECTRIC COMPANY, *Appellant*

v.

CITY OF SAN DIEGO, et al., *Appellees*

On Appeal From The Supreme Court of California

NATIONAL ASSOCIATION OF HOME BUILDERS AND CALIFORNIA BUILDING INDUSTRY ASSOCIATION BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Whether a state court can rule out the right of property owners to file compensatory taking, or inverse condemnation, actions in direct contravention of the United States Constitution and Supreme Court rulings thereunder.

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NATIONAL ASSOCIATION OF HOME BUILDERS AND CALIFORNIA BUILDING INDUSTRY ASSOCIATION BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT

Amici have received the parties' written consent to file this brief and have filed the letters of consent with the Clerk of the Court.

INTEREST OF AMICI

The National Association of Home Builders represents approximately 122,000 builder and associate members organized in 768 affiliated state and local associations in the fifty states, District of Columbia, and Puerto Rico. Its members include not only people

and companies that construct and supply single-family homes but also apartment, condominium, commercial, and industrial builders, as well as land developers and remodelers. The affiliated California Building Industry Association, composed of six regional and twenty local associations, has approximately 5,000 members that produce about seventy percent of the state's housing. We are the voice of the American and California shelter industry.

The Associations have a fervent interest in a just and fair approach to government use of private land, until now protected ultimately by the Constitution. Intertwined with this interest is the Associations' active involvement in trying to control the causes of skyrocketing housing costs. The impacts on our home buying and renting public and on the Associations' membership have been devastating. Throughout the past decade, an increasing percentage of low and moderate income families have been priced out of the housing market.

A major cause of this disturbing phenomenon has been the growing enactments of unduly restrictive zoning and land use controls by many shortsighted local governments. If the decision of the court below is not reversed, the practical capability of successfully challenging otherwise unconstitutional land use policies will greatly diminish, thereby accelerating the growth of exclusionary practices and further impeding the ability of this industry to assist the nation in meeting its critical housing needs.

CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part: ". . . nor shall private

property be taken for public use, without just compensation."

The fourteenth amendment to the Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

SUMMARY OF ARGUMENT

The straightforward language of the Constitution, supported by relevant caselaw, noted land use commentators, and the public policy considerations outlined below, makes plain that when public control of private property goes so far as to result in a taking, just compensation may be the only appropriate remedy. The just compensation clause, like the due process and equal protection clauses, is grounded in the equity concept of doing what is fundamentally fair under the circumstances of each case. Such a concept precludes the utterly inflexible remedy rule recently created by the lower court and now applied to cases, such as this one, in which a taking has been found to occur.

Speaking clearly to the substance and effect of government actions, the fifth amendment does not pose the taking question in simplistic terms of "police power" versus "eminent domain power" exercise. Hence remedy cannot be determined by the mere form that government uses to label an action but must be addressed on a case-by-case review of the facts. The lower court's *per se* rule, however, destroys any chance of balancing public gain with private loss and is an artlessly singular way of resolving complex land use issues.

Not every harsh regulation is necessarily compensable; but neither can every taking be necessarily uncompensable. At the very least, the right to file an inverse condemnation action for damages surely lies in those few cases in which harsh regulation is alleged to be so onerous as to result in the denial of *all* use of one's property. And it is precisely that acquisitive allegation that was proven in this case by the evidence and was sustained by both trial and appellate courts below. The compensation remedy is especially desirable, and necessary, in those spare instances in which government action, though so severe as to effect a taking, is nonetheless socially necessary.

Further, in these times of more complex and multivaried governmental actions combining to affect land use, just compensation can not only repair an individual's loss but also pierce the veil of a community's exclusionary or excessively arbitrary land use policies. Heavy-handed regulatory conduct, even if struck down as unconstitutional or invalid, all too often reappears in a different guise to accomplish the same restrictive results, namely artificially-increased land and housing costs. A damages remedy lessens the likelihood that a community will continue to play freely with the constitutional rights of its citizenry, be they property owners or housing consumers.

For this appeal, at bottom, is about substance over form, equity over legalism, the recognized need for the remedy to fit the wrong, and the right to meaningful judicial access to seek appropriate redress for unmistakable constitutional harm.

ARGUMENT

I. The Decision of the Court Below Effectively Destroys the Right To Make a Compensatory De Facto Taking Claim Despite the Just Compensation Clause and Rulings of This Court and Thus Denies a Needed Remedy for Controlling Unconstitutionally Aggravated Housing Costs.

This appeal's *raison d'être* is *Agins* v. *City of Tiburon,* 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979) (*Agins I*). In a sweeping and unprecedented policy decision that went far beyond the circumstances of that particular case, the court in *Agins I* declared that henceforth no one, regardless of the facts, may bring a claim under the United States and California Constitutions for inverse condemnation damages, that is, allege a de facto taking of private property by police power action without just compensation.

This Court, recognizing the dichotomous holdings of *Agins I,* affirmed the holding that no taking had occurred in that case, but did "not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation." 100 S. Ct. 2138, 2143 (1980) (*Agins II*). The full sweep of *Agins I* is now revealed here, for its *per se* remedy rule was applied blindingly to a case which, unlike *Agins,* had a full trial and a finding of a taking and an awarding of damages. *San Diego Gas & Electric Co.* v. *City of San Diego,*[1] 81 Cal. App. 3d 844, 146

[1] A unanimous appellate panel affirmed, in a classically-reasoned taking opinion, that based on trial evidence (E), certain zoning (Z) and planning (P) restrictions, together with an acquisition resolution (A), combined to equal a denial of all use of complainant's land (D), therefore resulting in an unconstitutional taking of property without just compensation (T) and requiring, in this circumstance, a remedy in inverse condemnation (IC). Or,

Cal. Rptr. 103 (1978), retransferred by Cal. Sup. Ct. to 4th D.C.A. and redetermined in light of *Agins I*, June 26, 1979, hearing denied, Cal. Sup. Ct., Aug. 22, 1979.

As put squarely by Professor Ellickson in his seminal article:

> The most pervasive judicial error in American land-development law is the reluctance to grant the remedy of damages. The deeply rooted misconception that the proper relief is usually the invalidation of part or all of the offending ordinance may be called the "*Nectow* fallacy" after *Nectow* v. *City of Cambridge,* [277 U.S. 183 (1928),] a Supreme Court decision of a half-century ago. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis,* 86 Yale L.J. 385, 490 (1977).[2]

Amici are here because the lower court is not merely reluctant to award damages, which is understandable, but, unlike any other American court, now refuses to

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E→Z+P+A=D.˙.T=IC. This simple formulation expresses in shorthand what has been a seemingly obvious concept until the *per se* rule of *Agins I*—that certain facts may lead to a legal conclusion necessitating the *appropriate* remedy (be it equitable relief or damages). The argument is not that damages are always, or frequently, the correct remedy for excessive regulatory restrictions; merely that they are a necessary judicial option, given the words and sense of the fifth amendment, at least in those few cases when property is rendered useless or valueless by harsh government actions.

[2] Professor Roberts further explains that there are cases, such as with some downzonings, when government regulation is so "unusual" as to require a remedy in damages, because the just compensation clause, like the due process and equal protection clauses, demands "fairness" in societal relationships. Roberts, *An Appropriate Economic Model of Judicial Review of Suburban Growth Control,* 55 Ind. L.J. 441, 461-64, 487-89 (1980).

permit a compensation claim even in the most outrageously-proven cases. *Agins I* (as applied to *San Diego*) is overly simplistic in its legal reasoning, bereft of any real comprehension of its social and land use ramifications, and at odds with the long-standing principles underlying the law of de facto taking.

The fifth amendment, made applicable to the states through the fourteenth amendment (*Chicago, B.&Q. R.R.* v. *City of Chicago,* 166 U.S. 226 (1897)), prohibits not only the deprivation of property without due process of law but also, in a separate clause, the taking of property without just compensation. Justice Douglas, cognizant of this language, reasoned that under some circumstances zoning regulations may constitute a compensable taking. *Village of Willoughby Hills* v. *Corrigan,* 29 Ohio St. 2d 39, 278 N.E.2d 658, *cert. denied,* 409 U.S. 919 (Douglas, J., dissenting) (1972). Citing Justice Holmes in *Pennsylvania Coal* v. *Mahon,* 260 U.S. 393 (1922), as well as the landmark zoning case of *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926), Justice Douglas noted that exercise of the police power could result in the effective taking of private property; if so,

> Arguably eminent domain *principles* then apply; and, although the public may force upon the property owner the public need for his land, compensation is due him. 409 U.S. at 920 (emphasis added).

By ruling that an aggrieved plaintiff may only make a claim for equitable relief, rather than a claim for damages, the lower court has effectively merged the Constitution's due process and just compensation clauses so as to preclude any claim under the latter.

Aside from the violence this does to the words and meaning of the fifth amendment, it makes for irrational and unfair land use policy because a government regulation could be legally valid, not justifying a declaratory, injunctive, or mandamus remedy, yet at the same time so harsh as to deny a person all reasonable use of his land, thereby justifying the inverse condemnation remedy (of course, a regulation could also be invalid and a taking as well).[3] A further effect of the lower court's decision is to shift to California's federal courts all regulatory land use cases in which an allegation of unconstitutional taking without just compensation is made, thus increasing the federal judiciary's land use law caseload, a field traditionally left to the state courts.

Equally important is the deleterious effect of *Agins I* on housing costs. From 1969 through 1979, the percentage of American families able to afford the median-priced new house has dropped from almost 40 to 22 percent. National Association of Home Builders, Economics Department; B. Frieden and A. Solomon, *The Nation's Housing: 1975-1985* 125 (Joint Center for Urban Studies of MIT & Harvard 1977). A recent federal government task force has found that since the early 1970's, rising housing costs have been "greatly exacerbated by" growing local land use regulations

[3] For the importance as to remedy in the fifth amendment's distinction between deprivation and taking, *see* Comment, *Balancing Private Loss Against Public Gain To Test for a Violation of Due Process or a Taking Without Just Compensation*, 54 Wash. L. Rev. 315, 319-27 (1979); D. Godschalk, et al., Constitutional Issues of Growth Management 53-64 (rev. ed. 1979); D. Mandelker, Managing Our Urban Environment 624 (2d ed. 1971); Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y.U. L. Rev. 1238, 1253-54 (1960).

that unnecessarily restrict new housing development. "These new factors that have quickened the pace of rising housing costs portend a long-term problem for the future unless major steps are taken." U.S. Department of Housing & Urban Development, *Final Report of the Task Force on Housing Costs* 4 (May 1978); *see* U.S. General Accounting Office, *Report to the Congress—Why Are New House Prices So High, How Are They Influenced by Government Regulations, and Can Prices Be Reduced?* 41 (May 1978).

Otherwise unconstitutional land use controls that effectively exclude low and moderate income housing from the community are very difficult to challenge successfully. The *per se* remedy rule announced in *Agins I* would increase the burden much higher. If a local governing authority should have a particular control declared invalid or unconstitutional by a court, the authority all too often responds by taking another regulatory action (or, as here, combination of actions) to accomplish the same or similar result. Adopting a slightly different, or new, ordinance, plan, regulation, or permit procedure, altering a standard, or initiating a development moratorium are common examples. Even if the subsequent actions are likewise challenged successfully, the enormous time and expense involved in litigation often obliterates the original housing goal sought. And should any housing finally be constructed (usually less than originally proposed and permitted by law), the added costs of delay are inevitably borne by the housing consumer as well as builder.[4] But the

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[4] Individual prospective home buyers almost by definition are not organized in such a fashion as to exert meaningful pressure or influence on a community's exclusionary land use policies. As

natural propensity to shift regulatory gears rather than deal directly with the problem is frequently eviscerated if taking damages can be claimed and proven.[5] To paraphrase Dr. Johnson, depend upon it, sir, when a government knows it is to be assessed damages in a fortnight, it concentrates its mind wonderfully.

The Douglas Commission, in its exhaustive report to the President and Congress a decade ago, found that certain zoning and other land use control abuses unnecessarily increased housing costs to such a degree as to lead to exclusionary practices relating to residential developments. This frequently resulted when "[t]he community rigs its master plan and accompanying zoning ordinance" with "excessive" standards and prohibitions. One of the Commission's recommendations for a regulation that went so far as to take one's property was that compensation should be paid. This, the Commission thought, would assist in leading toward a more orderly urban development. Report of the National Commission on Urban Problems, *Building the American City* 18-19, 199-253 (specifically 206, 211-17, 224-26, 251) (1968). *Agins I's* effect, however, makes it much easier for parochial governments to do as they please with absolutely no judicial check (con-

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noted in a study by the Rutgers University Center for Urban Policy Research:

> The deficiency of the emphasis on [protecting existing home owner] property rights was that it failed to take into account the rights of prospective homebuyers who were excluded from any municipalities by the excessive cost of suburban homeownership. S. Seidel, Housing Costs and Government Regulations 380 (1978). *See also* M. Mann, The Right to Housing—Constitutional Issues and Remedies in Exclusionary Zoning (1976); L. Sagalyn & G. Sternlieb, Zoning and Housing Costs —The Impact of Land-Use Controls on Housing Price (1973).

[5] *See* note 13 *infra*.

stitutional remedy) available should some control go too far and result in compensatory damage and, therefore, makes it much harder to surmount excessive or arbitrary policies that push up housing costs.

Professor Williams summed it up best in his landmark treatise when he recognized that inverse condemnation[6] "can play a useful role as part of an overall land use regulation system, to provide some protection for landowners against de facto takings." 5 N. Williams, American Planning Law—Land Use and the Police Power § 159.18 (1975). More to the point, this Court as recently as last term acknowledged in a legislative immunity case the *constitutional right to file* an "inverse condemnation" action, ruling further that this was not the occasion to review the circuit court's holding that a violation of the due process clause had been adequately alleged, in which appellants had claimed that an improper exercise of the police power had led to a "taking" or an "inverse condemnation." *Lake Country Estates* v. *Tahoe Regional Planning Agency,* 440 U.S. 391, 395-96, 397 n.11 (1979); *see Jacobson* v. *Tahoe Regional Planning Agency,* 566 F.2d 1353 (9th Cir. 1977).

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[6] Defined as "the popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Thornburg* v. *Port of Portland,* 233 Or. 178, 180 n.1, 376 P.2d 100, 101 n.1 (1962); *City of Jacksonville* v. *Schumann,* 167 So.2d 95, 98 (1st D.C.A. Fla. 1964), *cert. denied,* 172 So.2d 597 (Fla. 1965), *cert. denied,* 390 U.S. 981 (1968) (takings found in airplane overflight cases); 11 E. McQuillin, The Law of Municipal Corporations § 32.132a (3d ed. rev. 1977). More simply, "inverse condemnation" has been described as an action "to redress a taking without compensation." *Sixth Camden Corp.* v. *Township of Evesham,* 420 F. Supp. 709, 721 (D.N.J. 1976).

What this Court acknowledged as constitutionally allegable on March 5, 1979, the California *Agins* court read abruptly out of the Constitution nine days later, causing a reversal of the holding, as well as policy and logic, enunciated by a unanimous Court of Appeal in *San Diego.*

Lake Country Estates is the tip of an iceberg of Supreme Court taking cases stretching back a century. The first notable such case, *Pumpelly* v. *Green Bay Co.,* 80 U.S. (13 Wall.) 166 (1871), found a compensable taking when flooding effectively destroyed a property's usefulness despite the absence of an actual appropriation for public use. It exemplifies the simplest type of inverse taking, that of physical invasion. *Pumpelly* also provides a vivid illustration of the essense of inverse condemnation (a phrase that gained prominence in the 1960's)—the transmutation of police power exercise or regulation into an exercise of compensable taking. As explained in 2 P. Nichols, The Law of Eminent Domain § 6.1[1] (3d ed. rev. 1976):

> Any limitation on the free use and enjoyment of property constitutes a *taking* of property within the meaning of the *constitutional provision.* It is sufficient that the person claiming *compensation* has some right or privilege in the appropriated property, which right or privilege is destroyed, injured or abridged by such appropriation . . . .
>
> *Constitutional rights rest on substance, not on form,* and the liability to pay compensation for property taken cannot be evaded by leaving the title in the owner, while depriving him of the beneficial use of the property. It has already been shown that a legal restriction upon the use of land may constitute a taking, *although the title is unaffected and the land is physically untouched,*

> and the same is true when the owner's enjoyment of the land is physically interfered with although his legal rights remain unimpaired. (emphasis added).

A half century after *Pumpelly,* the philosophical underpinning of inverse condemnation gained its fullest expression in the "leading"[7] taking case of *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922). Justice Holmes framed the question of the case as "whether the police power can be stretched so far"[8] and went on to hold *not* when "the extent of the taking is great."[9] Hence it has for years been persuasively demonstrated that grievous abuse of the police power can be remedied, where proven appropriate, by constitutional just compensation. Equally important for purposes of this appeal, the *right to file* and attempt to prove such a claim is obviously implicit in the Court's result.

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. [cite omitted]. When this seemingly absolute protection is found to be *qualified by the police power, the natural tendency of human nature is to extend the qualification more and more* until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

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[7] *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104, 127 (1978).

[8] 260 U.S. at 413.

[9] 260 U.S. at 414.

> *The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . .* We are in danger of forgetting that *a strong public desire to improve the public condition is not enough* to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. 260 U.S. at 415-16 (emphasis added).

The lower court plainly succumbed to that "natural tendency of human nature." Instead of determining if a specific case for inverse condemnation had been adequately made out and proven in *San Diego,* the court (in *Agins I*) merely acknowledged the public value of land use planning and execution ("to improve the public condition") and then inexplicably placed that value forever above the Constitution's just compensation clause.

Most recently, this Court has rejected such a peremptory approach in the telling decision of *Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979). In finding that a compensable taking had occurred based on the case's circumstances, the opinion of the Court reasoned that the government's regulation or use of petitioners' property had gone "so far . . . as to amount to a taking under the logic of *Pennsylvania Coal* v. *Mahon,* 260 U.S. 393 (1922)." 444 U.S. at 178. Put simply and directly, the remedy rule of *Agins I* just does not square with a century's worth of taking law nor with basic fairness.

It is legal and social folly to strive for worthy environmental improvement (here, the city deemed the

company property desirable as open space) by simplistically pitting the taking question as "police power" versus "eminent domain power" exercise.

> There is an almost *irresistable urge* in this matter to think of the question in terms of police power versus eminent domain—as if the choice of means for working for environmental improvement had to be either one or the other. The process of choosing means for implementing policy goals for environmental improvement thus tends to start with the premise that public agencies should first see how far they can go in requiring landowners to submit to regulatory controls of land use, and resort to eminent domain techniques only where the courts compel them to compensate landowners for a "taking" of property. Netherton, *Implementation of Land Use Policy: Police Power vs. Eminent Domain,* 3 Land & Water L. Rev. 33, 50 (1968) (emphasis added).

Netherton, explaining that the either/or approach is an unfair and unwise way to protect the community environment, argues for the judicious approach in the "gray areas between those situations where it is obvious that police power should be used and those where it is not so obvious":

> During the period of experimental regulation the landowner's interest can be protected by recourse to an action in *inverse condemnation* where he can sustain the burden of proving damages. Netherton at 55 (emphasis added).

Yielding to the "irresistable urge," the court below, despite explicit constitutional provisions against takings [10] and countless judicial rulings thereunder, has

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[10] The California Constitution's just compensation clause is technically broader than that of the United States Constitution. It

created an illusory distinction that, in practice, renders inverse condemnation suits nugatory in California courts. As Professor Waite, who supports *Pennsylvania Coal's* "diminution of property value" test as one way of judging when police power regulation becomes compensable, said:

> Today it is hard to justify the different compensation philosophies applied to landowners in eminent domain and police power matters . . . . [R]emembering property to be a bundle of rights, it is clear this distinction, too, is illusory. The *substantive* content of title is largely rights of use, and in *both* situations a transfer has occurred . . . Waite, *Governmental Power and Private Property,* 16 Cath. U.L. Rev. 283, 292 (1967) (emphasis added).

This distinction without a difference in the taking context,[11] implicit in *Pennsylvania Coal* and taking cases since, is perhaps most forcefully explicated by the Texas courts. In *San Antonio River Authority* v. *Garrett Brothers,* 528 S.W.2d 266, 273 (Tex. Civ. App.

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reads: "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner." Cal. Const. art. 1, § 19. Half the states have "damaged" provisions in their constitutions (all fifty have just compensation clauses, which have been interpreted as substantially the same as the federal clause, with or without the "damaging" language). Note, *Inverse Condemnation: The Case for Diminution in Property Value as Compensable Damage,* 28 Stan. L. Rev. 779, 779 n.2 (1976).

[11] *See* Berger, *To Regulate, Or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights,* 8 Loy.L.A.L. Rev. 253, 268-75 (1975); Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain By the Courts: So-Called Inverse or Reverse Condemnation,* 1968 Urb. L. Ann. 1, 4.

1975), where a compensable "temporary taking" was found in a city's refusal to issue utility permits for land the city might later acquire, the court explained:

> If there is a taking the constitution requires payment, even though the taking be for the purpose of promoting the public health, safety, morals or welfare and, therefore, involves an exercise of the police power. [cites omitted]. *The empty formalism of "police power" cannot be made the basis for denying compensation,* and the Texas Supreme Court has expressly refused to "compartmentalize an exercise of sovereignty as either police power or eminent domain for the resolution of [taking] problems arising under [the state constitution]." (emphasis added).[12]

It is one thing to review the facts and circumstances of a case and then to reject its claims as improvidently made or ill proven. It is quite another matter, however, to decide for expedient reasons that a constitutional

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[12] In a later case for "inverse condemnation" damages, where a city denied a development permit in order to gain a scenic easement for the public, the court stated:

> [T]here is really no distinction between the powers of eminent domain and an exercising of the police power, when a person's property is taken or the use of same damaged by the state (or city). A person's property may not be taken or damaged as an incident to the exercise of the police power without the payment of compensation. *City of Austin* v. *Teague,* 556 S.W. 2d 400, 403 (Tex. Civ. App. 1977).

The state supreme court reversed on other grounds and remanded for retrial of the amount of damages and noted:

> The labels are not helpful. These two doctrines—police power and eminent domain—*merge at so many places when applied to specific problems,* that the legal battlefields have been variously termed a "sophistic Miltonian Serbonian Bog," . . . a "crazy-quilt pattern," . . . "the manifest illusoriness of distinctions," . . . . 570 S.W. 2d 389, 397 (Tex. 1978) (emphasis added).

cause of action can no longer even be raised under any circumstances for fear that it may disrupt the regular flow of governmental land use decisions. This unfounded fear of governmental disruption is especially ironic given the profound disruption now to be visited upon the principle supporting an equitable approach to land management and the providing of affordable housing. Until the *Agins I* opinion, the just compensation clause has never been treated by any court as sheerly precatory language.

II. The Decision of the Court Below Is Manifestly Contrary to the Case-By-Case Review Required by the Just Compensation Clause and Rulings of This Court.

The constitutional dilemma peremptorily sworn off by the lower court was specifically addressed by this Court in *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978). A classic taking case, the issue was whether application of a regulatory land use ordinance resulted in a "temporary taking" of property without just compensation in violation of the fifth and fourteenth amendments. 438 U.S. at 107, 119. While *Penn Central* acknowledged the high burden of proving a taking and, under the facts of the case, found no taking had occurred, *its comprehensive analysis upholds the constitutional right to make the claim and attempt to prove it under law.* That is precisely what occurred in *San Diego* before it was reversed. This right becomes absolutely fundamental because taking questions are "essentially ad hoc, factual inquiries" with no "set formula" to guide a court since the very question of a taking "depends largely upon the particular circumstances" of each case. 438 U.S. at 124; *Kaiser Aetna, supra,* at 175 (taking

found); *see* Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty* in Southwestern Legal Foundation, Proceedings of the Institute on Planning, Zoning, and Eminent Domain 177 (1980).

Save for the erratic compensation holding announced in *Agins I*, the necessity of case-by-case constitutional analysis has been uniformly emphasized by courts and commentators alike. Again, Justice Holmes sets the framework in *Pennsylvania Coal:*

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. *So the question depends on the particular facts . . . [I]t always is open to interested parties to contend that the legislature has gone beyond its constitutional power.* 260 U.S. at 413 (emphasis added).

In *Berman* v. *Parker*, 348 U.S. 26, 32 (1954), in which a property owner alleged that a land use plan for urban renewal violated both the fifth amendment's due process and just compensation clauses as applied to his land, Justice Douglas said without reservation:

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, *for each case must turn on its own facts.*

> (emphasis added) (*accord, e.g., Armstrong* v. *United States,* 364 U.S. 40, 48 (1960)).

And the Court in *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 594 (1962), in upholding an ordinance that prevented further mining by appellant, firmly noted:

> This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. [cites omitted]. *There is no set formula to determine where regulation ends and taking begins.* (emphasis added).

Doubtlessly, then, case-by-case determinations of whether land use controls result in compensable takings must be made. 1 R. Anderson, American Law of Zoning § 3.25 (2d ed. 1976); 11 E. McQuillin, The Law of Municipal Corporations § 32.26 (3d ed. rev. 1977); 2 P. Nichols, *supra,* at § 6.3; 1 A. Rathkopf, Law of Planning and Zoning § 6.02 (4th ed. 1978); 2 P. Rohan, Zoning and Land Use Controls § 7.03[3][d] (1978); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria,* 44 S. Cal. L. Rev. 1, 13-48 (1970); Waite, *supra,* at 289. Otherwise, the very words of the just compensation clause ring hollow. "The issue of regulation as against taking is always a matter of degree." *Morris County Land Improvement Co.* v. *Township of Parsippany - Troy Hills,* 40 N.J. 539, 193 A.2d 232, 241 (1963); *accord, e.g., Donohoe Construction Co.* v. *Montgomery County Council,* 567 F.2d 603, 608 n.13 (4th Cir. 1977); *Dahl* v. *City of Palo Alto,* 372 F. Supp. 647, 648 (N.D. Cal. 1974); *Hermanson* v. *Board of County Commissioners,* 595 P.2d 694 (Colo. App. 1979); *Brecciaroli* v.

Connecticut Commissioner of Environmental Protection, 168 Conn. 349, 362 A.2d 948, 951-52 (1975); *Bureau of Mines* v. *George's Creek Coal and Land Co.,* 272 Md. 143, 321 A.2d 748 (1974); *Commissioner of Natural Resources* v. *S. Volpe & Co.,* 349 Mass. 104, 206 N.E.2d 666, 669-70 (1965); *Aronson* v. *Town of Sharon,* 346 Mass. 598, 195 N.E.2d 341, 345 (1964); *Penn Central Transportation Co.* v. *New York City,* 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd,* 438 U.S. 104 (1978); *City of Austin* v. *Teague,* 570 S.W.2d 389, 393 (Tex. 1978).

The ineluctable logic and reasonableness of what the law has been is reflected in what the law *should* be as well. The American Law Institute advocates that:

> The particular circumstances of *each case* must be examined to see on which side of the regulation/taking line it falls. [cites omitted].
>
> This Code authorizes the payment of compensation in those cases in which the agency feels that the elimination of existing uses would impose too great a burden on the property owner. (§ 5-102). The Code makes no attempt to define the conditions under which compensation *must* [emphasis in original] be paid. *This is a basic constitutional issue that can be left to case-by-case decision . . . .* Under this Code a landowner who convinces a court that a regulation is unconstitutionally restrictive *may obtain compensation* or a declaration of the regulation's invalidity. (§ 9-111). ALI Model Land Development Code 155-56 (1976) (emphasis added).

Thus inverse condemnation actions clearly form an organic and inseparable part of the fifth and fourteenth amendments. The "authority is overwhelming"

that confiscatory regulation gives rise to such relief.[13] Indeed, de facto taking claims have become so commonplace in American legal theory that courts have developed four sometimes overlapping approaches for supporting an award of damages for an unconstitutional taking of property. D. Godschalk, et al., Constitutional Issues of Growth Management 53-64 (rev. ed. 1979); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165, 1183-1201 (1967); Sax, *Takings, Private Property and Public Rights,* 81 Yale L.J. 149, 151 (1971); *Developments in the Law—Zoning,* 91 Harv. L. Rev. 1427, 1462-1501 (1978). These approaches, or tests, are generally referred to as those for:

1) *physical invasion*—the elementary approach, represented by *Pumpelly* and *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962) (airplane overflight case); but as stated in *Penn Central,* "we do not embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel." 438 U.S. at 123 n.25;

2) *diminution of value*—the approach exemplified by *Pennsylvania Coal,* in which a regulation that causes an excessive decline in a property's market value effects a taking;

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[13] Berger, *supra* note 9, at 279. Professor Dunham, in a seminal article, reasons that the inverse condemnation remedy would check arbitrary land use regulation by striking a constitutional balance between public gain and private cost. Dunham, *supra* note 3. In addition to Berger and Dunham, two other noted land use law professors provide lucid discussions of the social need, as well as constitutional requirement, for compensatory regulation via the inverse condemnation remedy. *See* Beuscher, *supra* note 9; Hagman, *Compensable Regulation: A Way of Dealing with Wipeouts from Land Use Controls?,* 54 U. of Det. J. Urb. L. 45 (1976).

3) *nuisance abatement*—if a regulation prevents a harm (abates a nuisance) no compensable taking occurs, but if it confers a benefit on the public then damages are awarded; this test, formulated in E. Freund, The Police Power § 511 (1904), finds examples in the *San Diego*-like *Dahl, supra* (rezoning property to open space in order to avoid cost of acquisition gives rise to constitutional "inverse condemnation" action), and *State* v. *Griggs,* 89 Ariz. 70, 358 P.2d 174 (1960) (a regulation that saves government money rather than protects the public health or safety from an injurious use of land is an unconstitutional taking without compensation; *cf. Cardon Oil Co.* v. *City of Phoenix,* 122 Ariz. 102, 593 P.2d 656 (1979)); and,

4) *balancing of interests*—the broadest test, this weighs the public good against private detriment, considering such factors as a regulation's duration and impact on use of land, the harm sought to be cured, and whether objective studies support the need and scope of the regulation; its essence, as Professor Michelman would emphasize, is that of "fairness" (*see, e.g., Brecciaroli, supra,* and *Village of Willoughby Hills, supra*).

Certainly this Court has recognized the ad hoc nature of judging "taking without just compensation" claims by looking at such factors as the "economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action. . . ." *Kaiser Aetna, supra,* at 175. Implicit in the need for weighing both private and public interests (*Agins II, supra,* at 2141) is the realization that a compensation remedy could never be precluded in every conceivable case.

The stunningly absolutist approach adopted by the lower court, however, patently denies any factual inquiry into damage and remedy and thereby begs the taking question before it can be rightfully posed. Since the 1960's, land use law has become far more than planning, zoning, subdivision, and urban renewal, and now encompasses more complex issues of environmental regulation, historic preservation, transfers of development rights, growth management, and all facets of how land is to be used, developed, and controlled, balancing private rights with public needs. Turning the salient constitutional issue of differing applications of land use regulation into an either/or contest unnecessarily belittles both the Constitution and conservation. As the Supreme Judicial Court of Massachusetts so presciently observed:

> The [government] argue[s] as though all that need be done is to demonstrate a public purpose and then no regulation in the interests of conservation can be too extreme. . . An unrecognized taking in the guise of regulation is worse than confiscation. . .
>
> In this conflict between the ecological and the constitutional, *it is plain that neither is to be consumed by the other. Commissioner of Natural Resources* v. *S. Volpe & Co.*, 349 Mass. 104, 206 N.E. 2d 666, 671 (1965) (emphasis added).[14]

Compensatory takings thus occur primarily in two critical situations: whenever a zoning ordinance pre-

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[14] For discussions of how highly questionable zoning and land use practices are increasingly being clothed in the respectable language of environmental protection, *see* M. Brooks, Housing Equity and Environmental Protection: The Needless Conflict 2 (1976); R. Nelson, Zoning and Property Rights—An Analysis of the American System of Land-Use Regulation 162-63 (1977).

cludes reasonable use of a property, and whenever a government places an undue and uncompensated burden on an individual landowner in order to achieve a public good. 1 A. Rathkopf, *supra. San Diego* includes classic taking issue elements: an acquisitive intent (and effect) evidenced by the combination of an acquisition resolution including the subject property, the rezoning of a portion of the land to a lower density, and the designation of the property as "open space" on the city's general plan. Compensatory takings in the land use context have been found or permissibly alleged time after time in cases with elements such as these. Well known examples from across the nation include:

Zoning—Sixth Camden Corp. v. *Township of Evesham,* 420 F. Supp. 709 (D.N.J. 1976) (inverse condemnation action under fifth and fourteenth amendments); *Dahl, supra* (inverse condemnation; open space rezoning); *Klopping* v. *City of Whittier,* 8 Cal. 3d 39, 500 P.2d 1354, 104 Cal. Rptr. 1 (1972) (inverse condemnation); *Petersen* v. *City of Decorah,* 259 N.W. 2d 553 (Iowa App. 1977); *Aronson, supra; Morris County Land Improvement Co., supra* (to keep land in substantially natural state); *Village of Willoughby Hills, supra.*

Subdivision, development—Gordon v. *City of Warren,* 579 F.2d 386 (6th Cir. 1978); *Hotel Coamo Springs, Inc.* v. *Hernandez Colon,* 426 F. Supp. 664 (D.P.R. 1976); *Estuary Properties, Inc.* v. *Askew,* 381 So. 2d 1126 (Fla. App. 1979); *Ventures in Property I* v. *City of Wichita,* 225 Kan. 698, 594 P.2d 671 (1979) (inverse condemnation); *Lomarch Corp.* v. *Englewood,* 51 N.J. 108, 237 A.2d 881 (1968) ("temporary tak-

ing"); *City of Austin* v. *Teague*, 570 S.W. 2d 389 (Tex. 1978) (inverse condemnation; denial of permit to gain scenic easement); *San Antonio River Authority, supra* ("temporary taking");

Planning—Washington Market Enterprises, Inc. v. *City of Trenton*, 68 N.J. 107, 343 A.2d 408 (1975);

Police power combinations—Donohoe Construction Co., supra (planning, zoning, subdivision, building permit actions); *Sanfilippo* v. *County of Santa Cruz*, 415 F. Supp. 1340 (N.D. Cal. 1976) (inverse condemnation; planning and zoning); *Peacock* v. *County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969) (inverse condemnation; planning, zoning, and subdivision actions); *Hermanson, supra* (inverse condemnation; zoning, sewer regulation, and building moratorium);

Other police power regulations—Petz v. *United States*, 209 Ct. Cl. 270, 531 F.2d 1018 (1976) (inverse condemnation; ban of barges within federal park to maintain natural state); *Bydlon* v. *United States*, 146 Ct. Cl. 764, 175 F. Supp. 891 (1959) (ban of low-level air travel over national forest to maintain natural state); and,

Eminent domain (dilatory or abandoned)—Thomas W. Garland, Inc. v. *City of St. Louis*, 596 F.2d 784 (8th Cir. 1979); *Richmond Elks Hall Association* v. *Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977) (inverse condemnation); *Foster* v. *City of Detroit*, 405 F.2d 138 (6th Cir. 1968); *Madison Realty Co.* v. *City of Detroit*, 315 F. Supp. 367 (E.D. Mich. 1970); *Haczela* v. *City of Bridgeport*, 299 F. Supp. 709 (D. Conn. 1969); *Benenson* v. *United States*, 212 Ct.

Cl. 375, 548 F.2d 939 (1977) (inverse condemnation); *Drakes Bay Land Co.* v. *United States,* 191 Ct. Cl. 389, 424 F.2d 574 (1970); *Clifton* v. *Berry,* 244 Ga. 78, 259 S.E.2d 35 (1979) (inverse condemnation); *Hardesty* v. *State Roads Commission,* 276 Md. 25, 343 A.2d 884 (1975) (scenic easement); *Lincoln Loan Co.* v. *State Highway Commission,* 274 Or. 49, 545 P.2d 105 (1976); *Miller* v. *City of Beaver Falls,* 368 Pa. 189, 82 A.2d 34 (1951); *In re Cornell Industrial Electric, Inc.,* 19 Pa. Commw. 599, 338 A.2d 752 (1975).

The Supreme Court opinions in *Pumpelly, Pennsylvania Coal,* and *Penn Central* are major pronouncements of the unwavering constitutional principle that private property cannot be appropriated via exercise of the police power without payment of just compensation. *Kaiser Aetna* pellucidly affirms the principle. The above litany of federal and state cases bears that point out as well as the more fundamental point that the fifth and fourteenth amendments insure, at minimum, *the right to make a claim for a taking of property.*

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right. . . . In fact, a *fundamental interdependence* exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. *That rights in property are basic civil rights has long been recognized. Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 552 (1972) (emphasis added).

The severe and singular remedy approach adopted in *Agins I* and applied in *San Diego,* denying for the fu-

ture any chance for a case-by-case taking analysis, flies in the face of both the Constitution and Supreme Court rulings thereunder. At its heart, the Constitution seeks that necessary balance between individual rights, personal and property, and public necessity. That is the essence of fairness, and, at bottom, the value of constitutional scrutiny.

CONCLUSION

For the above reasons, the Court should note probable jurisdiction and reverse the decision of the Supreme Court of California.

Respectfully submitted,

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